STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	Nos. 237957; 242899 Oakland Circuit Court
RONALD ROVINSKY, Defendant-Appellant.	LC No. 99-164635-FH

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (engaging in sexual contact with a child under the age of thirteen), and was sentenced to a prison term of fifteen months to two years. The trial court denied defendant's motion for judgment notwithstanding the verdict and/or for a new trial. The prosecutor appealed the sentence to this Court.[1] This Court remanded the case to the circuit court for resentencing. On remand, defendant was sentenced to a prison term of fifteen months to fifteen years. Defendant appeals his conviction and sentence as of right. We affirm.

Docket No. 237957

Defendant first argues that the verdict is against the great weight of the evidence and that he is entitled to a new trial. A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the fact finder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993),

[1] Docket No. 239826.

overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The issue usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but if there is conflicting evidence, the question of credibility ordinarily should be left for the fact finder, *Lemmon, supra* at 642-643.

In denying defendant's motion for JNOV and/or for a new trial, the court stated:

> the court finds that the verdict was supported by the great weight of the evidence. The court would also note that issues of witness credibility are for the jury and the trial court may not substitute its view of the credibility for that of a jury and may not sit as the thirteen juror.

Although acknowledging that *Lemmon* held that the jury is the final judge of credibility, defendant seems to be asking this Court to ignore *Lemmon* and permit the trial court to substitute its judgment for that of the jury on matters of credibility.

The sum and substance of defendant's argument is that, "It would not be fair to allow defendant Ronald Rovinsky's conviction to stand in the face of such contradictory overwhelming evidence when it is weighed against the presumption of innocence." In support of this assertion defendant simply states that the victim's testimony

> contradicts indisputable physical facts (the seat belts), defies physical realities (that defendant would do this in a car moving at freeway speeds with [the victim's] ten year old brother sitting in the back seat), or where Ashley's testimony has been seriously impeached (the victim's brother did not see the touching, and he was sitting less than two feet away) and the case was marked by uncertainties and discrepancies (the mother's report of the chronology of events is disparate with the time line of the official reports made; doctor/nurse thought just a UTI; Ashley at school with no effects; Ashley playing . . .).

Each of these allegations involves the issue of credibility. Indeed, this case is a classic example of a credibility contest between a victim and a defendant. A review of the facts of this case, however, reveals that the evidence was adequate to support the jury's verdict if the jury found the victim's testimony to be credible. The trial court correctly left the issue of the credibility of the witnesses to the jury. *Lemmon, supra*. The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The trial court did not err by denying defendant's motion for a directed verdict or a new trial.

Defendant next argues that the evidence was insufficient to support the verdict. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant does not contend that the prosecution failed to prove any of the elements of the crime beyond a reasonable doubt, but rather contends that defendant presented evidence that proves that it was not physically possible for the assault to have occurred. Thus, defendant's argument essentially goes to the great weight of the evidence, not the sufficiency of the evidence. Further, he is essentially contending that his testimony is more credible than the victim's testimony. In reviewing the sufficiency of the evidence, conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

MCL 750.520c(1)(a) provides in pertinent part that a person is guilty of second-degree CSC "if the person engages in sexual contact with another person" and the "other person is under 13 years of age." "Thus, an assault with intent to commit second-degree CSC requires proof of an assault with an intent to engage in sexual contact with a person less than thirteen years of age. An assault may be found where there is either an attempted battery or an unlawful act placing another in reasonable apprehension of an immediate battery. *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). Here, the victim testified that she was five-years old when defendant improperly touched her genital area. Thus, according to her testimony, she was-at the very least-placed in reasonable apprehension of a battery (second-degree CSC). Accordingly, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction.

Defendant contends that the trial court abused its discretion by allowing the victim's mother to testify regarding the statement made to her by the victim because the evidence was substantive, not corroborative. A trial court's decision to admit or deny evidence is reviewed on appeal for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

MRE 803A, the "tender years" exception to the hearsay rule, provides in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
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> (1) the declarant was under the age of ten when the statement was made;
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> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

When the victim took the stand, she testified that defendant was a friend of her dad's, that he took her for a ride in his car with her brother, and that while they were driving Ron "rubbed my pee pee." Through the victim's testimony, the elements of second-degree CSC were

established. The victim's mother's testimony regarding what the victim told her, therefore, was not substantive but, rather, was introduced to corroborate the testimony of a tender-aged child.[2]

Defendant also contends that the third element was not satisfied because there was no evidence that the victim was in fear from the time the incident occurred until she told her mother about the incident some two to three hours later. Defendant relies on the fact that the victim went outside to play before telling her mother about the incident to support his argument.

Here, the trial court found that the victim' two- to three-hour delay in disclosing the information to her mother was attributable to the fact that defendant came back into the house after the assault. This finding is not clearly erroneous. The record reveals that the victim made the statement to her mother between two and three hours after the incident occurred. A delay in making the declaration may be excusable under certain circumstances. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996) (several day delay in reporting sexual abuse by the defendant father was excusable because of complainant's fear of reprisal by the defendant); *People v Hammons*, 210 Mich App 554; 534 NW2d 183 (1995) (eight- or nine month delay in reporting sexual abuse was excusable on basis of victim's well-grounded fear of the defendant). The victim was only five years old, and the defendant is a long-time family friend. Defendant went back to the victim's house after the incident, and the victim went outside to play. Upon returning home and finding her mother alone, she told her mother what had happened. Under these circumstances, the two- or three-hour delay is clearly excusable. Accordingly, the statement was properly admitted pursuant to MRE 803(A).

Next, defendant asserts that the trial court erred by denying his motion for a pretrial "taint" hearing to determine whether the victim's account of the event was distorted, or "tainted" by the interviews with the victim. A hearing on the motion was held on March 29, 2000. On June 2, 2000, an order denying the motion for taint hearing was entered. The order stated that the motion was "denied for the reasons stated on the record on March 29, 2000." Defendant has failed to provide this Court with a copy of the transcript of the pretrial taint hearing. Failure to provide this Court with the relevant transcript, as required by MCR 7.210(B)(1)(a) constitutes a waiver of the issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).[3]

Docket No. 242899

Defendant argues that the trial court abused its discretion by sentencing defendant on remand to a minimum term of fifteen months. He argues that the trial court failed to recognize that he could have sentenced defendant to a different sentence because the remand order allowed him to consider the whole sentence invalidated and, therefore, open to total resentencing.

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[2] Thus, defendant's argument that he was denied his constitutional right to confront witnesses against him as a result of Rita's substantive, rather than corroborative, testimony is without merit. Rita's testimony merely corroborated Ashley's testimony, and Ashley was subject to cross-examination.

[3] We note, however, that defendant was afforded an opportunity to present evidence of his "taint" theory to the jury and the jury apparently rejected the theory. Indeed, defendant's expert on the issue of "taint" admittedly did not have all of the facts in formulating her opinion.

Defendant was originally sentenced to a term of fifteen months to two years.[4] On delayed cross-appeal to this Court, the prosecutor argued that the maximum sentence imposed by the trial court was unlawful and invalid because by statute the maximum sentenced for second-degree CSC is fifteen years, and by statute when a trial court imposes an indeterminate sentence the maximum sentence must be the maximum penalty provided by law. This Court entered an order peremptorily remanding for resentencing

> because the 2-year maximum sentence imposed by the Oakland Circuit Court is invalid. Under MCL 769.8(1) the maximum penalty provided by law shall be the maximum sentence in all cases except as otherwise provided, and the maximum penalty for the crime for which defendant was convicted is 15 years under MCL 750.520c(2).

On remand, the trial court held a sentencing hearing and resentenced defendant to a term of fifteen months to fifteen years.

Because the sentences as originally imposed did not state the correct statutory maximum term, they were invalid. MCL 769.8(1); see also *People v Mitchell*, 175 Mich App 83, 93-94; 437 NW2d 304 (1989). Correction of the invalid sentences was a ministerial act, and did not require a full resentencing. *People v Miles*, 454 Mich 90, 99; 559 NW2d 299 (1997). Thus, although the trial court held a resentencing hearing and permitted defendant to present argument, the trial court was not obligated by this Court's order to revisit on remand the minimum sentence originally imposed by this Court where the minimum sentence was not invalid. The trial court was obligated only to correct the invalid maximum sentence, and the trial court complied by setting the maximum sentence at fifteen years. No error occurred.[5]

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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[4] The Presentence Investigation Report recommended a term of two to fifteen years.

[5] The trial court's comments at the resentencing reflect that the trial court was well aware that this Court invalidated the *maximum* sentence originally imposed by the trial court. The trial court also commented in response to defendant's argument for a lesser minimum sentence that if the minimum sentence was altered that the prosecutor would likely appeal *because the fifteen-month minimum term originally imposed was proper*. The court's comment that it had "no alternative" but to sentence him to "that" refers to the fifteen-year maximum term.